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No. 84-1808

In The

Supreme Court of the United States

October Term, 1984

JAMES WHITE, d/b/a
BLUE WAVE OYSTER CO., et al.,

Petitioners,

vs.

M/V TESTBANK, her engines, tackle,
apparel, her Owners, etc., et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION ON BEHALF OF FORTUNE SEA TRANSPORT CORPORATION, PANAMA S.A. AND THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION, LTD., RESPONDENTS

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STATEMENT OF THE CASE

This litigation grows out of a ship collision in inland Louisiana waters. A cargo of chemicals, dislodged from one of the ships, fell into the waterway, and had to be removed. During clean-up, the waterway, as well as a large surrounding area of estuary, was closed off to all activity. Suits were brought by various and sundry third-

party interests who had suffered no physical loss whatever from the collision, but who claimed damages for alleged economic loss as a result of the closure of the area. The trial court ruled that, with the exception of commercial fishermen, parties claiming only economic loss had no rights, and their claims were dismissed on summary judgment. On appeal a panel of the Fifth Circuit affirmed unanimously and subsequently the Fifth Circuit affirmed en banc.

The claims of commercial fishermen have all been settled and are not involved in this application.

The sole legal question presented is the correctness of the long established rule of this and other courts that third-parties who have sustained no physical damage may not recover for pure economic loss; that physical damage to a proprietary interest is a prerequisite to recovery for claimed economic loss in cases of unintentional tort.

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REASONS FOR DENYING THE WRIT

I.

The Decision Of The Court Of Appeals Is In Full Accord With All Decisions On This Well Settled Point Of Law.

Certiorari is sought in connection with the decision of the Fifth Circuit Court of Appeals following an en banc rehearing which affirmed the Court's three-judge panel, which had earlier affirmed the trial court. Each of these rulings was to the same effect; that as a matter of law, there can be no recovery for purely economic loss in these circumstances.

This rule is supported, not only by a long line of Fifth Circuit decisions, but by decisions from all other circuits which have considered the question. It is based, in fact, upon the decision of this Court in *Robins Dry-dock & Repair Co. v. Flint,* 275 U.S. 303 (1927).

In *Robins,* this Court ruled that one who has sustained no physical damage (in that instance the contract charterer of a vessel which had been damaged) had no legal right to claim for purely economic loss. The words of Mr. Justice Holmes were:

> "[N]o authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong . . . . The law does not spread its protection so far."

The principle of *Robins,* which was by no means new to that decision, has been interpreted by a number of circuits. It would be unnecessarily burdensome to review all of those decisions in the Fifth Circuit which have applied the rule, but even a partial listing would include the following:

> *Akron Corp. v. M/V CANTIGNY,* 706 F.2d 151 (5th Cir. 1983), *reh'g. denied,* 711 F.2d 1054 (5th Cir. 1983)
>
> *Vicksburg Towing v. Mississippi Marine Transport,* 609 F.2d 176 (5th Cir. 1980)
>
> *Dick Meyers Towing Service, Inc. v. U.S.,* 577 F.2d 1023 (5th Cir. 1978), *cert. denied,* 440 U.S. 908 (1979)
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Rojas v. American Dredging Co., No. 73-3802 consolidated with No. 78-3850 (E.D. La., July 18, 1979), *aff'd*, 633 F.2d 579 (5th Cir. 1980)

In opinion after opinion, the Fifth Circuit has steadily followed the rule that *recovery may not be had by those claiming the economic effects of loss or damage to property in which they have no proprietary interest.*

This rule of law is not a peculiarity of the Fifth Circuit. In fact, it is the rule in all circuits which have considered the question.

In the Eleventh Circuit, the identical result has been reached in *Kingston Shipping Co., Inc. v. Roberts*, 667 F.2d 34 (11th Cir. 1982), *cert. denied sub. nom, ABC Containerline v. Kingston Shipping Co.*, 458 U.S. 1108 (1982), as well as in *Hercules Carriers, Inc. v. State of Florida*, 720 F.2d 1201 (11th Cir. 1983), *aff'd*, 728 F.2d 1359 (11th Cir. 1984).

In the Fourth Circuit, the rule is identical, see *Marine Navigation Sulphur Carriers, Inc. v. Lone Star Industries, Inc.*, 507 F.Supp. 205, 1980 AMC 974 (E.D. Va. 1980), *aff'd*, 638 F.2d 700 (4th Cir. 1981).

The controlling law in the Second Circuit is also supportive, see *Petitions of Kinsman Transit Co.*, 388 F.2d 821 (2nd Cir. 1968).

Outside the federal system, the Supreme Court of Louisiana, where the casualty occurred, has recently reviewed Louisiana law on the point, and has confirmed that it reaches the identical legal result, see *PPG Industries, Inc. v. Bean Dredging*, 447 So.2d 1058 (La. 1984).

Going further afield, the law of England and of the British Commonwealth is in full accord. As recently as July 1, 1985, judgment was given in London by the Lords of the Judicial Committee of the Privy Council, the highest appellate court of the British Commonwealth, in *Candlewood Navigation Corporation Limited v. Mitsui O.S.K. Lines Limited, et al.*, 1985 A.C. — (P.C. 1985). In denying the charterer of a vessel recovery for its economic loss, their lordships found support in Scottish, Canadian, and United States decisions, and particularly referred to the decision of Mr. Justice Holmes in *Robins,* noting as well the action taken by the Fifth Circuit Court of Appeals in this very case in which certiorari is sought. The judgment reaffirms the long established principle that in respect of damage done to property, the common law does not recognize those whose only rights are a contractual right to use, without possession of or property in the damaged item.

In short, the rule of law which petitioners would have this Court change is one which is not only based upon a decision of this Court, but is one very broadly established in the federal system and elsewhere; one which is sound; and one for the change of which the petition advances no important or convincing reason.

II.

There Exists In This Instance No Special Or Important Reason For Review By The Court.

There is in this litigation no circumstance which may be considered a special or important reason for further judicial review.

The decision of the Court of Appeals is not in conflict with any decision of this Court, and rather is in full accord with the holding of this Court in *Robins.*

There is no conflict among the circuits; the same result would have been reached in the Second, the Fourth, the Fifth, or the Eleventh these being all of the circuits which have considered the point, and presumably the same result would have been reached in each of the other circuits as well.

There is no conflict here between the Fifth Circuit and the highest court of the State of Louisiana, where the events took place.

There is here no question of judicial procedure.

The question is of little importance outside of this particular litigation.

III.

The Petition For Certiorari Fails To Identify The Petitioners And Is Fatally Defective.

Nowhere in the petition are the petitioners identified. Certainly an essential requirement of any petition is that the parties on whose behalf it is presented be made known. Their identity may have a bearing on whether the petition should be allowed or denied, and the failure to comply with this basic requirement is a valid reason for denying the writ, without more.

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CONCLUSION

The decision of which review is sought is in all respects correct, is in full accord with all decisions on point from the various courts of appeal, and there is no special or important reason for certiorari, which should be denied. Furthermore, the failure of the petition to identify

those on whose behalf it has been submitted is an independent grounds for dismissal.

New Orleans, Louisiana, July 12, 1985.

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